(2)

No. 91-1460

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

KARL EASTON, M.D.,

Petitioner,

—against—

CLARENCE J. SUNDRAM, PAUL STAVIS, WALTER E. SAURACK, JOHN J. RYBALTOWSKI, BRUCE E. FEIG, FRANCINE COURNOS, PAUL GLICKMAN, LOUIS J. PATACK, KATHLEEN SWEENEY and ILENE MARGOLIN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES i

INTRODUCTION 1

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 6

A. The Court Below Correctly Ruled That Petitioner's Allegations Of Malicious Civil Prosecution Fail To State A Claim Under 42 U.S.C. § 1983 6

B. The Court Below Correctly Declined To Expand The Definition Of A Constitutional Claim Based On Defamation As Set Forth By This Court in *Paul v. Davis*, *Board of Regents v. Roth* And *Siegert v. Gilley* 9

CONCLUSION 11

TABLE OF AUTHORITIES

Cases	PAGE
Blum v. Yaretsky, 457 U.S. 991 (1982)	10
Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972)	2, 9
Friedman v. Village of Skokie, 763 F.2d 236 (7th Cir. 1985)	7
Harlow v. Fitzgerald, 457 U.S. 80 (1982)	7
Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)	7, 8
Juidice v. Vail, 430 U.S. 327 (1977)	8
Lebbos v. Judges of the Superior Court, Santa Clara County, 883 F.2d 810 (9th Cir. 1989)	10
Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982)	8
Neu v. Corcoran, 869 F.2d 662 (2d Cir.), *cert. denied*, 493 U.S. 816 (1989)	5, 6, 9
Northern Westchester Professional Park Associates v. Town of Bedford, 60 N.Y.2d 492 (1983)	2
Parratt v. Taylor, 451 U.S. 527 (1981)	6
Paul v. Davis, 424 U.S. 693 (1976)	*passim*
People v. BPRI, No. 91-06269	2, 4
Siegert v. Gilley, __ U.S. __, 111 S.Ct. 1789 (1991)	9
Torres v. Superintendent of Police of Puerto Rico, 893 F.2d 404 (1st Cir. 1990)	7
White v. Frank, 855 F.2d 956 (2d Cir. 1988)	5, 7
Younger v. Harris, 401 U.S. 37 (1971)	8

PAGE

Constitutional and Statutory Provisions

18 U.S.C. § 1961 4

42 U.S.C. § 1983 ..... *passim*

New York Mental Hygiene Law § 31.28 ..... 3, 10

New York Mental Hygiene Law Article 45 3

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INTRODUCTION

Petitioner, a psychiatrist charged by the State of New York with Medicaid and real estate fraud, seeks review of the decision of the United States Court of Appeals for the Second Circuit affirming a decision of the District Court for the Southern District of New York dismissing his complaint. The opinion, reported at 947 F.2d 1011 (2d Cir. 1991) and reproduced in Appendix A to the Petition (Pet. 1a-14a), held, *inter alia*, that petitioner's allegations of malicious civil prosecution failed to rise to the level of a constitutional violation under 42 U.S.C. § 1983. The court further held that respondents were entitled to qualified immunity from petitioner's

claim that he was deprived of a protected liberty interest under the Fourteenth Amendment, in view of the court's prior interpretations of *Paul v. Davis*, 424 U.S. 693 (1976) and *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).

The petition should be denied because the decision of the Court of Appeals was correct in all respects and the petition raises no significant or important questions worthy of review by this Court. The decision below was consistent with this Court's rulings on the limited circumstances in which a state tort claim asserts a deprivation of constitutional magnitude, and petitioner does not claim otherwise. He seeks, rather, this Court's opinions on broad constitutional questions which, the court below concluded, were not necessary to the decision in this case and whose resolution by this Court will have no impact on the parties to this dispute, since respondents are entitled to qualified immunity with respect to both claims.

In addition, the petition neglects to advise the Court that the dismissal of the underlying New York State civil enforcement action,[1] upon which petitioner's claims here are based (A. 319-411)[2], is presently scheduled for an expedited appeal to the Appellate Division, Second Department. That court is authorized to review the facts *de novo*, particularly after a bench trial. *See Northern Westchester Professional Park Associates v. Town of Bedford*, 60 N.Y.2d 492 (1983). Should the dismissal of the State's complaint be reversed, all of petitioner's claims will become moot, thus further militating against issuance of the writ.

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1 *People of the State of New York, New York State Office of Mental Health and New York State Department of Social Services v. Brooklyn Psychosocial Rehabilitation Institute, 3 Lafayette Avenue Corporation, Cobble Hill Center Corporation, Dr. Karl Easton, Jacqualine Easton, Irving Link and Theodore Rosten*, App. Div. Index No. 91-06269 ("*People v. BPRI*").

2 Second Circuit Appendix, hereinafter "A".

STATEMENT OF THE CASE

Petitioner commenced this federal civil rights suit after a State civil enforcement action charged that he had enriched his family-owned realty corporations by fraudulently billing Medicaid for non-existent services while operating a dangerously sub-standard mental health facility (BPRI) and improperly retaining patient personal funds. (SA. 121-146).[3] The civil suit was based upon evidence of fiscal and patient abuse uncovered by the State agency plaintiffs. (SA. 9, 36-72).

Upon application by the plaintiffs, two justices of the New York Supreme Court authorized the appointment of a receiver to protect the mentally ill clients of the facility, pursuant to New York State Mental Hygiene Law ("MHL") § 31.28. Following a lengthy trial before a Judicial Hearing Officer ("JHO"), the case was dismissed on the grounds that the plaintiffs had failed to prove their allegations. As noted, that determination is currently on appeal.

Before the JHO issued a decision in the State case, petitioner brought this action in the United States District Court for the Southern District of New York seeking $40 million in damages against respondents in their individual and official capacities. The *pro se* complaint, consisting of 310 paragraphs of allegations and 1100 pages of exhibits from the trial, alleged that ten officials from four State agencies, including attorneys, psychiatrists, mental health and fiscal analysts, agency administrators and consultants,[4] conspired to

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3 Second Circuit Supplementary Appendix, hereinafter "SA.".

4 The defendants and their affiliations are as follows:

1) *Clarence Sundram*, Chairman of the New York State Commission on Quality of Care for the Mentally Disabled (an independent oversight agency established by Article 45 of the New York Mental Hygiene Law) ("CQC").

2) *Paul Stavis*, Counsel to CQC.

3) *Walter E. Saurack*, Chief of Fiscal Investigations/Cost Effectiveness Bureau, CQC.

(*Footnote continued on next page*)

intentionally lie about petitioner's activities, persecute him, defame him, deprive him of his property and of his job at BPRI, and thus violate his constitutional rights and the provisions of the "Civil RICO" statute, 18 U.S.C. § 1961 *et seq.* Petitioner also alleged that respondents committed numerous common law torts including negligence, defamation and malicious prosecution.

On July 12, 1990, in an unreported decision, the district court (Sweet, J.) dismissed the complaint for failure to state a federal claim. (Pet. 15a-29a). After the JHO dismissed the State complaint, petitioner forwarded the decision to the district court and moved for reargument. The court denied the motion on January 14, 1991. (A. 412).

Petitioner raised several issues on appeal to the Second Circuit Court of Appeals, only two of which are relevant to this petition: (a) whether petitioner's claim of "malicious civil prosecution," based on *People v. BPRI*, rises to the level of a constitutional violation, and (b) whether allegedly defamatory statements in a State agency report, combined with the receiver's termination of petitioner from his position at BPRI, constituted "deprivation of liberty without due process of law."

The Court of Appeals affirmed the district court's dismissal of the complaint. The court acknowledged that a criminal prosecution that ends in acquittal may, in some cases, give rise to a cause of action under 42 U.S.C. § 1983, but

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4) *John J. Rybaltowski*, Program Cost Analyst, CQC.

5) *Bruce E. Feig*, Executive Deputy Commissioner, New York State Office of Mental Health ("OMH").

6) *Louis J. Patack*, Assistant Counsel, OMH.

7) *Francine Cournos, M.D.*, Psychiatric Consultant, OMH.

8) *Kathleen Sweeney*, Standards Compliance Analyst, OMH.

9) *Ilene Margolin*, former Special Assistant to the Governor of the State of New York.

10) *Paul Glickman*, former Assistant Attorney General of the State of New York.

found no precedent and no grounds for extending the constitutional claim to a civil enforcement action.[5] Stating that to the best of its knowledge "no other court to have considered the question has [so] held" (Pet. App. 12a), the court noted that "criminal malicious prosecution typically implicates constitutional rights secured by the fourteenth amendment, such as deprivation of liberty, that are not automatically implicated in a malicious civil suit." (Pet. 12a). Such rights include freedom from extreme and shocking official misconduct such as physical abuse, detention, unequal protection of the law or invasion of privacy, none of which are alleged here. Nor is such conduct generally implicated in a civil regulatory action, "even if broad-based and aggressive." Pet. 13a.

Absent deprivation of such fundamental rights, the court below rejected the argument that the alleged malicious civil prosecution in this case was anything more than an actionable state tort claim. It found that petitioner was not "subjected to a misuse of the legal process so egregious as to work a deprivation of a constitutional dimension." (Pet. 13a-14a).

With respect to petitioner's claim that he was deprived of liberty without due process of law, the court held that defendants were entitled to qualified immunity since "the law of this Circuit has not clearly established that the conduct that Easton complains of rises to the level of a constitutional violation, rather than simply a state tort." (Pet. 9a). Analyzing its prior opinions, including *Neu v. Corcoran*, 869 F.2d 662 (2d Cir.), *cert denied*, 493 U.S. 816 (1989), in light of this Court's definition of "stigma plus" in *Paul v. Davis*, 424 U.S. at 701, the court adhered to its prior conclusion that "our cases have not 'clearly established that defamation

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5 The court also reiterated the necessity that a claimant allege all the necessary elements of the state tort of malicious prosecution (Pet. 11a), *i.e.*, (1) initiation of a criminal action against the plaintiff, (2) with malice, (3) without probable cause and 4) termination of the criminal proceedings in plaintiff's favor. *See White v. Frank*, 855 F.2d 956, 959, n.2 (2d Cir. 1988).

occurring other than in the course of dismissal from a government job or termination of some other legal right o[r] status will suffice to constitute a deprivation of a liberty interest.' " (Pet. 9a, *quoting Neu v. Corcoran*, 869 F.2d at 667).

The court additionally rejected petitioner's "strained argument" that his termination by a court-appointed receiver constituted loss of government employment. Questioning whether the receiver was a state actor in this context, the court noted that, in any event, petitioner was terminated from private, not public employment. (Pet. 10a-11a).

REASONS FOR DENYING THE WRIT

A. The Court Below Correctly Ruled That Petitioner's Allegations Of Malicious Civil Prosecution Fail To State A Claim Under 42 U.S.C. § 1983.

This Court has consistently refused to elevate state common law torts to injuries of a constitutional magnitude. As stated in the oft-quoted comment in *Paul v. Davis*, 424 U.S. at 701, the Court should not "make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. . . . [T]he procedural guarantees of the Due Process Clause cannot be the source for [a body of general federal tort] law." *Accord Parratt v. Taylor*, 451 U.S. 527, 544 (1981).

Notwithstanding these decisions, petitioner seeks certiorari expressly for the purpose of creating and defining a new federal cause of action in which an unsuccessful civil action by state officials, allegedly brought with malice and without probable cause, would provide the basis for a federal civil rights remedy as well as a state common law tort claim for damages, despite the absence of physical abuse or incarcera-

tion. As the court below stated, no reported decision has recognized such a federal claim.[6]

Petitioner's assertion that there is a conflict among the circuit courts is thus inaccurate. It is only with respect to *criminal* malicious prosecution that any such differences exist. Thus, some courts have recognized such a claim based on the due process clause where the plaintiff has alleged the loss of physical liberty, through false arrest or imprisonment. *See e.g.*, *White v. Frank*, 855 F.2d at 957. As petitioner correctly notes, however, several courts have refused to elevate this tort to a constitutional claim, *see Friedman v. Village of Skokie*, 763 F.2d 236, 239 (7th Cir. 1985), or have done so only in the face of abusive criminal proceedings so egregious as to shock the conscience. *See Torres v. Superintendent of Police of Puerto Rico*, 893 F.2d 404, 409 (1st Cir. 1990). In this case, in contrast, petitioner alleges no loss of physical liberty and no analogous deprivation of fundamental constitutional rights. He therefore presents no basis for this Court to "examine and elucidate" the contours of a constitutional claim for civil malicious prosecution in this case. (Pet. 12).

In an effort to cure this defect, petitioner asserts that the loss of his job and his professional reputation "had an enormous negative effect upon him" which was "at least as great as if he had been arrested and falsely charged by state criminal authorities." (Pet. 10-11). Petitioner fails to articulate, however, how this "negative effect" implicated rights guaranteed by the Constitution, except by reference to petitioner's proposed expansion of this Court's and the lower court's definition of "stigma plus" to include loss of a private job. Without a State deprivation of such protected rights, petitioner's argument for a federal cause of an action under section 1983 for malicious civil prosecution remains flawed.

Petitioner's analogy to *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) and its progeny to bridge the gap between civil

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6 The respondents in this case accordingly would be entitled to qualified immunity from suit even if such a new cause of action were to be established by this Court. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

and criminal prosecutions misreads the significance of those cases. *Huffman* extended the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971) to certain state civil proceedings. For the limited purpose of determining the propriety of federal intervention in on-going state court proceedings, *Huffman* recognized that civil and criminal actions alike serve important state purposes and that considerations of comity and federalism dictate federal judicial restraint in both instances. 420 U.S. at 604.

Huffman noted the similarity between the civil and criminal statutes at issue in that particular case. It did not base its holding primarily on that likeness, however, or minimize the differences between criminal and civil proceedings for all purposes, as petitioner seeks to do. Indeed, the Court later applied the *Huffman* doctrine to civil proceedings without regard to any resemblance to a criminal or quasi-criminal action, based *solely* on the determination that the "federal-court interference" would " 'unduly interfere[ ] with the legitimate activities of the Stat[e].' " *Juidice v. Vail*, 430 U.S. 327, 335-336 (1977), *quoting Younger v. Harris*, 401 U.S. at 44; *see also Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 432 (1982) (abstention from interference in proceedings "necessary for the vindication of important state policies or the functioning of the state judicial system").

Petitioner ignores this over-riding concern for the principles of federalism and urges the opposite result. Rather than abiding by the spirit of these cases, which counsel deference to legitimate state judicial procedures, *see Juidice v. Vail*, 430 U.S. at 336, he seeks a federal constitutional overlay on state tort law, which, in this case, provides full avenues of relief for petitioner's claim.

Petitioner's interpretation of *Huffman* has troublesome practical implications. A federal claim for state civil malicious prosecution necessarily would encompass thousands of regulatory schemes in each state, and open the federal floodgates to claims by disgruntled subjects of local regulation.

Such expansion of federal litigation is unwarranted given the panoply of remedies available under state law. Indeed, petitioner himself has had more than one full and fair post-deprivation hearing in New York State courts, and has notified the State of his intent to pursue his tort law remedies as well.

B. The Court Below Correctly Declined To Expand The Definition Of A Constitutional Claim Based On Defamation As Set Forth By This Court in *Paul v. Davis*, *Board of Regents v. Roth* And *Siegert v. Gilley*.

In *Paul v. Davis*, 424 U.S. 693, this Court articulated a clear test for determining when an injury to reputation may constitute a breach of rights guaranteed by the Fourteenth Amendment. The defamation by a state official must have occurred in connection with "governmental action . . . [that] deprived the individual of *a right previously held under state law*." *Id.* at 7-8. (emphasis supplied). The "right" may be a government job, as in *Board of Regents v. Roth*, 408 U.S. 564, or a "status previously recognized by state law . . . [which is] officially remov[ed] . . . from the recognition and protection previously afforded by the State. . . ." *Paul v. Davis* 424 U.S. at 711. In recently reaffirming this "stigma plus" test in *Siegert v. Gilley*, ____ U.S. ____, 111 S.Ct. 1789, 1794 (1991), this Court further noted that the alleged defamation must be uttered "incident to" the termination of the protected right.[7]

The court below has declined on several occasions, including the decision below, to broaden this "stigma plus" test to include injuries *not* expressly protected by state law, *see Neu v. Corcoran*, 869 F.2d at 667, such as petitioner's loss of private employment and his alleged "professional injury." The

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7 It is unclear how petitioner could meet the "incident to" standard in any event since he alleges different components of the "stigma plus" claim against different respondents and waived his conspiracy claim below. *See* Complaint, ¶¶ 241-246 and 261-263 (A. 51-53), charging respondents Sundram, Stavis, Rybaltowski and Saurack with defamation and respondent Feig with wrongful dismissal.

petitioner proffers no reasons for this Court to review the determination below other than his argument that the "state appointed receiver" must be considered a "state actor." Pet. 13. The receiver, however, was a not-for-profit agency appointed by two members of the State judiciary. Although the State executive agencies requested the appointment, the receiver had independent statutory authority and was directly accountable at all times to the State court. *See* New York State Mental Hygiene Law § 31.28. It is therefore highly doubtful that the conduct of the receiver can be attributed to the State for the purposes of meeting the test of state action. *See Blum v. Yaretsky*, 457 U.S. 991 (1982) (nursing home's eligibility determinations, although designed to meet state regulatory mandates, not state action).[8]

Furthermore, since it is indisputable that the receiver terminated petitioner from a private job, he was not deprived of any right or "status previously recognized under state law." *Paul v. Davis*, 424 U.S. at 711. Therefore, even under petitioner's theory, he has presented no "stigma plus" question worthy of this Court's attention.

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8 Petitioner's reliance on *Lebbos v. Judges of the Superior Court, Santa Clara County*, 883 F.2d 810, 818 n.10 (9th Cir. 1989) is thus inapposite. In that case, plaintiff sued both the receiver and the judge who appointed him to enforce an allegedly unconstitutional state law.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
April 7, 1992

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